man, 115 Fed. 124; *Rose* v. *Clark,* 8 Paige 573; *Richard* v. *Brehm,* 73 Pa. St. 140, 13 Am. Rep. 733. But in practically all of the cases which are cited in support of this rule there had been cohabitation, and the statements of the courts as to the necessity for cohabitation are open to the objection that they do not relate to a litigated point. *Lorimer* v. *Lorimer,* 124 Mich. 631 and *Taylor* v. *State,* 52 Miss. 84 are open to this objection, though in both cases the courts stated that instructions given by the trial courts, failing to state that cohabitation was necessary, were erroneous. The exact point was raised in *Ashley* v. *State,* 109 Ala. 48, which was a prosecution for bigamy. The second marriage was solemnized under a void license but there was no cohabitation. On appeal it was held that there was no common law marriage. Precisely the opposite conclusion was reached in *Davis* v. *Davis,* 7 Daly (N. Y.) 308. The court said, "All that is necessary to constitute a valid marriage between parties competent to contract it, is their mutual consent to enter into the marital relation. * * * No particular ceremony or form of words is necessary, nor is cohabitation essential to its validity." There is dictum to the same effect in *Dickerson* v. *Brown,* 49 Miss. 357, 370. The weight of authority is apparently with the principal case, though it is difficult to see why there should be any difference in this respect between a ceremonial marriage and a common-law marriage.

OFFICERS—DE JURE OFFICER'S RIGHT TO COMPENSATION.—In a suit against a county for salary due as clerk of the board of road commissioners, plaintiff Hogan proved that he had rightfully continued in office and performed the duties thereof, because one McCutcheon, claimed to have been elected as his successor, was only a *de facto* officer under a void election. *Held,* the plaintiff could compel the county to pay the salary accrued. The court said further: "Even if McCutcheon had undertaken to perform the duties of the office, and had collected the salary, this would not have relieved the county from the duty to pay Hogan, the rightful officer." *Hogan* v. *Hamilton County* (Tenn. 1915) 179 S. W. 128.

The cases involving the right of an officer *de jure* to his salary when the city or county has paid it to the incumbent officer *de facto,* before any judgment of ouster has been rendered against the latter, are hopelessly in conflict; but the rule generally prevailing is, that payment made in good faith to a *de facto* officer constitutes a bar to an action against the public corporation by an officer *de jure. Wayne County* v. *Benoit,* 20 Mich. 176, 4 Am. Rep. 382; *Nall* v. *Coulter,* 117 Ky. 747, 78 S. W. 1110; *Parker* v. *Dakota County,* 4 Minn. 30; *Dolan* v. *New York,* 68 N. Y. 274, 23 Am. Rep. 168; *Brown* v. *Tama County,* 122 Iowa 746, 98 N. W. 562. The correct reason, among the many offered, seems to be that the interest of the community requires that public offices be filled and the duties of the officers be discharged, and since, in order to secure such service, the officer performing must ordinarily be paid, payment in good faith to the officer discharging the duties of the office is justified. As stated by the court in *Michel* v. *New Orleans,* 32 La. Ann. 1094; "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in possession of the office and performing functions required for

the protection of society and the maintenance of peace and order; and after this duty is performed, both law and equity forbid that the city or state be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer." Nevertheless, a very respectable line of cases lay down the contrary doctrine that the right of a *de jure* officer to recover his salary from the public corporation is not impaired by payment to the officer *de facto*. *Mayor & Aldermen of Memphis* v. *Woodward,* 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Andrews* v. *Portland,* 79 Me. 484, 10 Am. St. Rep. 280; *State* v. *Carr,* 129 Ind. 44, 28 N. E. 88; *Tanner* v. *Edwards,* 31 Utah 80, 86 Pac. 765. A good discussion of the authorities may be found in the notes in 19 L. R. A. 689; 16 L. R. A. (N. S.) 794; and 10 Am. St. Rep. 284. The reason for this view is found in the *wrongful* payment to one not entitled to receive it; but keeping in mind that the reason for the *de facto* doctrine is to further the public interests, it is difficult to understand why such payment, when public necessity really demands it, should be regarded as wrongful. Several of the cases may be distinguished on their facts, where the city or state failed to act in good faith, or where the person to whom payment was made was a usurper or intruder. Yet in no case does the principal argument for the majority rule seem to be successfully controverted; and the statement made by the court in the instant case is in conflict with the better view.

PLEADING—NECESSITY FOR ALLEGING TRESPASS IN ASSUMPSIT FOR USE AND OCCUPATION AGAINST A TRESPASSER.—§ 11207 of the COMPILED LAWS OF MICHIGAN allows a party having a cause of action for the taking of timber or other trespass on lands to waive the tort and bring assumpsit therefor. In assumpsit for use and occupation brought by the owner of premises against one occupying under claim of right, *held,* that an action for use and occupation, being founded on contract, express or implied, will not lie where the occupancy of the one sought to be charged has been tortious; and that an action for assumpsit under the above statute, based on a waiver of tort, cannot be maintained where there has not been any reference in the declaration to the statute, nor any allegation of the fact of the trespass. *Smith* v. *Haight* (Mich. 1915), 154 N. W. 563.

The common count for use and occupation has not been allowed against a tortious occupant of land. *Ward* v. *Warner,* 8 Mich. 508; *M., H. & O. R. Co.* v. *Harlow,* 37 Mich. 554. With all the technical elements present of a quasi-contractual obligation to pay for the use and occupation, the remedy has been denied for historical reasons. WOODWARD, QUASI-CONTRACTS, § 284, and cases cited. But see the opinion of MANNING, J., in *Welch* v. *Bagg,* 12 Mich. 41, where assumpsit for pasturing cattle was allowed against a trespasser. Before the above statute was passed, in Michigan there could be no recovery in assumpsit for the value of property converted but not sold. *Watson* v. *Stever,* 25 Mich. 386. In this case assumpsit was held to be an improper remedy against a trespasser who cut and carried away the plaintiff's timber. The statute above, passed in 1875, was designed to remedy this situation. The suggestion that the plaintiff might waive the tort of occupying his